

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

IVAN REUTOV,	)
	) No. CV-05-0293-MWL
Plaintiff,	)
	) ORDER GRANTING DEFENDANT'S
v.	) MOTION FOR SUMMARY JUDGMENT
	)
JO ANNE B. BARNHART,	)
Commissioner of Social	)
Security,	)
	)
Defendant.	)
	)

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BEFORE THE COURT are cross-motions for summary judgment, noted for hearing with oral argument on May 10, 2006. (Ct. Rec. 9, 13, 17). Plaintiff Ivan Reutov ("Plaintiff") filed a reply brief on March 27, 2006. (Ct. Rec. 15). Attorney James T. Solan represents Plaintiff; Special Assistant United States Attorney Richard A. Morris represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 3). After reviewing the administrative record and the briefs and argument by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 13) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 9).

**JURISDICTION**

On January 17, 2002, Plaintiff filed applications for Supplemental Security Income ("SSI") benefits and Disability Insurance Benefits ("DIB"), alleging disability since October 15, 1998, due to pain in his neck and back and noise in his head. (Administrative Record ("AR") 92-94, 210, 307-311). The applications were denied initially and on reconsideration.

On December 3, 2003, Plaintiff appeared before Administrative Law Judge Mary B. Reed ("ALJ"), at which time testimony was taken from Plaintiff, Plaintiff's son (Anton Reutov), and vocational expert Daniel McKinney. (AR 334-397). A supplemental hearing was held on June 23, 2004, at which time testimony was taken from Plaintiff and Anton Reutov. (AR 398-458). A Russian language interpreter was present and assisted Plaintiff at both hearings. (AR 334, 398).

On November 1, 2004, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 15-24). The Appeals Council denied a request for review on July 29, 2005. (AR 6-9). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on September 26, 2005. (Ct. Rec. 1).

In Plaintiff's reply brief in this case, Plaintiff agreed that it is difficult to tell when he actually stopped working in the fishing industry. (Ct. Rec. 15, p. 2). Therefore, by way of his reply brief, on March 27, 2006, Plaintiff indicated that he reviewed the exhibits and testimony and determined that the date

1 of onset of disability should be amended to September 15, 2001.  
2 (Ct. Rec. 15, pp. 2-3).<sup>1</sup> Accordingly, the relevant time period in  
3 this case is from September 15, 2001 (Plaintiff's amended onset  
4 date) to November 1, 2004 (the date of the ALJ's decision in this  
5 case).

6 **STATEMENT OF FACTS**

7 The facts have been presented in the administrative hearing  
8 transcript, the ALJ's decision, and the briefs of the parties and  
9 will only be summarized here. Plaintiff was 56 years old on the  
10 date of the ALJ's decision. (AR 16).

11 Plaintiff testified at the administrative hearing held on  
12 December 3, 2003, that he could read and write in Russian but, in  
13 English, he could only read a little and could only write his  
14 signature. (AR 340). He obtained his citizenship in 1976, but  
15 attended no schooling in the United States. (AR 341).

16 Plaintiff testified that he began work in fishing in 1972.  
17 (AR 342). He was the captain of a boat, The Ceon, which he owned  
18 and piloted, and had employees to do all the work. (AR 342).  
19 Plaintiff also indicated he was previously in a construction  
20 business building pole barns with his sons, but had not done that  
21 type of work for three years. (AR 343). He additionally  
22 previously performed work in woodworking in Alaska. (AR 344-345).

23 Plaintiff indicated that he was not working as a fisherman  
24 anymore, but would go to Alaska in order to use his fishing  
25 license once a year. (AR 346, 368). Although Plaintiff stated  
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27 <sup>1</sup>On January 15, 2002, Plaintiff indicated his disability commenced on  
28 October 15, 1998 and that he worked after the date of his injuries,  
indicating that he "works summers on fishing boat only." (AR 210). Two days  
later in his application for SSI, Plaintiff reported that his disability began  
on January 1, 2000. (AR 307).

1 that he is unable to work, he described how he makes an income by  
2 using his fishing license. (AR 349). He indicated that he has  
3 workers go out on the boat, harvest the fish, clean the fish and  
4 bring them back in. (AR 349). He pays for all the expenses,  
5 including the workers' fees, and keeps the profit. (AR 349). To  
6 use his fishing license, he needs to be present at the dock when  
7 the boat comes in. (AR 348). If the person with the license is  
8 not present, the Halibut Commission may confiscate the fish. (AR  
9 348). This is how Plaintiff has supported himself since 2001, and  
10 he stated that this is what will happen every year. (AR 349).  
11 Plaintiff testified that he flies to Alaska once a year in order  
12 to present his fishing license. (AR 368).

13 Plaintiff indicated that Halibut fishing season is March  
14 through November, but the way it works is that you go out in the  
15 boat opening day and catch your quota within 24 hours. (AR 364).  
16 Therefore, all the Halibut fishing for the year would take place  
17 in one day. (AR 364-365).

18 Plaintiff testified that he was injured while working in  
19 construction in 1977. (AR 350). He fell from a top floor, lost  
20 consciousness and, later, noticed back and neck pain. (AR 350-  
21 351). He also had a fall on a boat in 1998 that damaged his neck.  
22 (AR 352). He stated that he stopped working following that fall.  
23 (AR 352). He indicated that what keeps him from working at this  
24 time is that he can no longer lift heavy things and experiences  
25 pain when bending. (AR 351). He has pain when walking and stated  
26 that he could only walk a couple of minutes before needing to sit.  
27 (AR 356).

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1 At the administrative hearing held on June 23, 2004,  
2 Plaintiff testified that he had transferred ownership in his boat  
3 to his son, Anton Reutov, so that Anton could use the boat as  
4 collateral for a loan for fishing equipment. (AR 408-409). He  
5 indicated that in 2001 and 2002 he was still paying for the  
6 moorage of the boat in Alaska, taking the same as an expense on  
7 his tax return. (AR 420). The ALJ pointed out that Plaintiff was  
8 claiming additional expenses on his tax returns in 2001 and 2002,  
9 including crew shares, annual gear, and diesel fuel. (AR 420-  
10 423). The ALJ additionally indicated that Plaintiff's tax returns  
11 reveal that Plaintiff was depreciating a Ford Ranger and a wash  
12 pump and received \$12,000 in income from Frame Right Construction.  
13 (AR 425). Plaintiff testified that, in 2004, he had traveled by  
14 plane to Alaska in order to present his fishing license to get  
15 paid for Halibut fishing that season. (AR 409-410). He stated  
16 that he was not involved with fishing or piloting the boat; he  
17 merely flew up to Alaska to present his fishing license at the  
18 docks. (AR 410). He indicated that his catch was worth \$21,000  
19 in 2004 before expenses. (AR 413). However, Plaintiff indicated  
20 that he has not done any physical work on the dock, nor worked on  
21 a boat, since around 2000. (AR 428).

22 With regard to the Frame Right partnership, Plaintiff  
23 testified that, although his name was on the partnership, he  
24 participated very little in the business. (AR 414-417). He did  
25 not do any work for Frame Right in 2003 or 2004. (AR 428-429).  
26 However, in 2002, he did some light work on a couple of occasions  
27 for Frame Right, but nothing extensive due to his limitations

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1 caused by pain. (AR 428-429). When Frame Right first started,  
2 Plaintiff did some work for them, but was not constantly involved  
3 with the business. (AR 428).

4 Plaintiff's son, Anton Reutov, testified at the  
5 administrative hearing on December 3, 2003, that he began fishing  
6 in Alaska with his father when he was 14 years old and has  
7 continued fishing since that time. (AR 373). He testified that  
8 he also owned and operated a pole barn building business (Frame  
9 Right) which was previously run as a partnership with his father  
10 and brother. (AR 387-390). Although he had not officially  
11 excluded his father and brother as partners, he indicated that it  
12 was solely his business at this time. (AR 389-390). He stated  
13 that his father had done no work for him in 2001 and had only  
14 worked a couple of days in 2002. (AR 387-389).

15 Anton Reutov also testified at the administrative hearing  
16 held on June 23, 2004. (AR 430). He stated that Plaintiff  
17 transferred his boat, The Ceon, to Anton in 1993 so that Anton  
18 would have collateral for a loan. (AR 432-434). However, it was  
19 related that Plaintiff still insured The Ceon and used it for  
20 fishing Halibut prior to 2000, but, legally, it had belonged to  
21 Anton. (AR 433-434). Anton later transferred ownership in the  
22 boat to his brother so that his brother could use the boat as  
23 collateral on a different loan.

24 When they started the pole barn building partnership in 1999,  
25 Anton stated that Plaintiff performed the trim work, which is the  
26 lightest work available on the job. (AR 442). He indicated that  
27 Plaintiff worked about 15 to 20 hours a week during that time.  
28 (AR 442). In 2002, Anton took over the company and continues to

1 run it on his own. (AR 443). He indicated that they never had a  
2 formal partnership agreement and, in 2002, Anton paid his brother  
3 and Plaintiff \$800 a piece for the business tools and essentially  
4 took over the business. (AR 443).

5 Anton testified that Plaintiff put in sporadic hours for  
6 Anton on the boat in 2001. (AR 446). Anton supervised the crews  
7 in 2001, not Plaintiff. (AR 448). Anton indicated that he  
8 overcompensated Plaintiff for the amount of work performed in  
9 2001, because Plaintiff was his father. (AR 446). Anton  
10 testified that, in 2001, Plaintiff at least tried to complete the  
11 fishing up in Alaska. (AR 454). He stated that Plaintiff has not  
12 returned to work since that time. (AR 455).

13 Vocational expert Daniel McKinney also testified at the  
14 December 3, 2003, administrative hearing. (AR 390).

15 **SEQUENTIAL EVALUATION PROCESS**

16 The Social Security Act (the "Act") defines "disability" as  
17 the "inability to engage in any substantial gainful activity by  
18 reason of any medically determinable physical or mental impairment  
19 which can be expected to result in death or which has lasted or  
20 can be expected to last for a continuous period of not less than  
21 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
22 Act also provides that a Plaintiff shall be determined to be under  
23 a disability only if any impairments are of such severity that a  
24 Plaintiff is not only unable to do previous work but cannot,  
25 considering Plaintiff's age, education and work experiences,  
26 engage in any other substantial gainful work which exists in the  
27 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
28 Thus, the definition of disability consists of both medical and

1 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
2 (9<sup>th</sup> Cir. 2001).

3 The Commissioner has established a five-step sequential  
4 evaluation process for determining whether a person is disabled.  
5 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
6 is engaged in substantial gainful activities. If so, benefits are  
7 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
8 not, the decision maker proceeds to step two, which determines  
9 whether Plaintiff has a medically severe impairment or combination  
10 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
11 416.920(a)(4)(ii).

12 If Plaintiff does not have a severe impairment or combination  
13 of impairments, the disability claim is denied. If the impairment  
14 is severe, the evaluation proceeds to the third step, which  
15 compares Plaintiff's impairment with a number of listed  
16 impairments acknowledged by the Commissioner to be so severe as to  
17 preclude substantial gainful activity. 20 C.F.R. §§  
18 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
19 App. 1. If the impairment meets or equals one of the listed  
20 impairments, Plaintiff is conclusively presumed to be disabled.  
21 If the impairment is not one conclusively presumed to be  
22 disabling, the evaluation proceeds to the fourth step, which  
23 determines whether the impairment prevents Plaintiff from  
24 performing work which was performed in the past. If a Plaintiff  
25 is able to perform previous work, that Plaintiff is deemed not  
26 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
27 At this step, Plaintiff's residual functional capacity ("RFC")  
28 assessment is considered. If Plaintiff cannot perform this work,



1 the fifth and final step in the process determines whether  
2 Plaintiff is able to perform other work in the national economy in  
3 view of Plaintiff's residual functional capacity, age, education  
4 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
5 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

6 The initial burden of proof rests upon Plaintiff to establish  
7 a *prima facie* case of entitlement to disability benefits.  
8 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
9 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
10 met once Plaintiff establishes that a physical or mental  
11 impairment prevents the performance of previous work. The burden  
12 then shifts, at step five, to the Commissioner to show that (1)  
13 Plaintiff can perform other substantial gainful activity and (2) a  
14 "significant number of jobs exist in the national economy" which  
15 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
16 Cir. 1984).

#### 17 STANDARD OF REVIEW

18 Congress has provided a limited scope of judicial review of a  
19 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
20 the Commissioner's decision, made through an ALJ, when the  
21 determination is not based on legal error and is supported by  
22 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995  
23 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
24 1999). "The [Commissioner's] determination that a plaintiff is  
25 not disabled will be upheld if the findings of fact are supported  
26 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
27 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
28 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d

1 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
2 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
3 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
4 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
5 evidence as a reasonable mind might accept as adequate to support  
6 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971).  
7 "[S]uch inferences and conclusions as the [Commissioner] may  
8 reasonably draw from the evidence" will also be upheld. *Mark v.*  
9 *Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the  
10 Court considers the record as a whole, not just the evidence  
11 supporting the decision of the Commissioner. *Weetman v. Sullivan*,  
12 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648  
13 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

14 It is the role of the trier of fact, not this Court, to  
15 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
16 evidence supports more than one rational interpretation, the Court  
17 may not substitute its judgment for that of the Commissioner.  
18 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
19 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
20 substantial evidence will still be set aside if the proper legal  
21 standards were not applied in weighing the evidence and making the  
22 decision. *Browner v. Secretary of Health and Human Services*, 839  
23 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
24 evidence to support the administrative findings, or if there is  
25 conflicting evidence that will support a finding of either  
26 disability or nondisability, the finding of the Commissioner is  
27 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
28 1987).

**ALJ'S FINDINGS**

The ALJ found at step one that Plaintiff has engaged in substantial gainful activity since his alleged onset date of October 1998. (AR 20). The ALJ found that the record is clear that Plaintiff continues to actively participate in the fishing business as he continues to render significant services to the business. (AR 20, 22-23). The ALJ found that Plaintiff's activity in a pole barn construction business with his son was also apparent from the record. (AR 20-23).

The ALJ indicated that tax returns for 2000 indicate that Plaintiff continued to fish for salmon (as well as halibut), and his gross receipts from fishing totaled \$52,700. (AR 21). His total expenses for 2000 was \$50,305, and he listed his occupation as a commercial fisherman. (AR 21). Plaintiff's 2001 tax return revealed a gross income from fishing of \$60,896 and total expenses of \$52,823. (AR 21). Plaintiff's 2002 tax return shows gross receipts from fishing of \$15,904 and total expenses of \$13,641. (AR 21). Tax returns for 2003 show \$34,257 in gross earnings from the fishing business with total expenses of \$22,084. (AR 21).

The ALJ concluded, at step one of the sequential evaluation process, that Plaintiff was not disabled within the meaning of the Social Security Act. (AR 23-24). If a claimant is found to be not disabled at any particular step, the Commissioner will make its determination without moving on to the next step. 20 C.F.R. § 404.1520(a)(4). Since the ALJ determined that Plaintiff was not disabled at the first step because Plaintiff continued to engage in substantial gainful activity, it was not necessary for the ALJ

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1 to proceed or analyze the rest of the steps in the sequential  
2 evaluation process.

### 3 ISSUES

4 Plaintiff contends that the Commissioner erred as a matter of  
5 law. Specifically, he argues that:

6 1. The ALJ erred by concluding, at step one of the  
7 sequential evaluation process, that Plaintiff was engaged in the  
8 performance of substantial gainful activity during the relevant  
9 time period; and

10 2. The ALJ erred by determining that Plaintiff was not  
11 entirely credible in this case.

12 This Court must uphold the Commissioner's determination that  
13 Plaintiff is not disabled if the Commissioner applied the proper  
14 legal standards and there is substantial evidence in the record as  
15 a whole to support the decision.

### 16 DISCUSSION

#### 17 **A. Substantial Gainful Activity**

18 Plaintiff contends that the ALJ erred by finding that  
19 Plaintiff continued to engage in substantial gainful activity  
20 after 2000. (Ct. Rec. 10, pp. 3-9). The Commissioner responds  
21 that the ALJ properly found that Plaintiff continued to perform  
22 substantial work activity during the relevant time period. (Ct.  
23 Rec. 14, pp. 6-9).

24 As noted above, by way of his March 27, 2006 reply brief  
25 Plaintiff indicated the date of onset of disability should be  
26 amended from October 15, 1998, to September 15, 2001. (Ct. Rec.  
27 15, pp. 2-3). Accordingly, the time period at issue in evaluating  
28 Plaintiff's activity in this case is from September 15, 2001

1 (Plaintiff's amended onset date) to November 1, 2004 (the date of  
2 the ALJ's decision in this case).

3 The Social Security Regulations establish a five step test  
4 under which to determine whether a claimant is disabled. 20  
5 C.F.R. § 404.1520(a)(1). The steps of the test are sequential,  
6 and if a claimant is found to be not disabled at any particular  
7 step, the Commissioner will make its determination without moving  
8 on to the next step. 20 C.F.R. § 404.1520(a)(4). At the first  
9 step, the Commissioner determines whether the claimant is engaged  
10 in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i).  
11 If a claimant is working and the work is deemed substantial  
12 gainful activity, the Commissioner must find that the claimant is  
13 not disabled regardless of his medical condition, age, education,  
14 or work experience. 20 C.F.R. § 404.1520(b). The initial burden  
15 of proof rests upon Plaintiff to establish a *prima facie* case of  
16 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d  
17 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup>  
18 Cir. 1999). Accordingly, the burden is on Plaintiff, at step one,  
19 to disprove that he has engaged in substantial gainful activity.

20 20 C.F.R. § 404.1575 sets forth the following three tests to  
21 determine whether a self-employed claimant has engaged in  
22 substantial gainful activity:

23 (1) Test One: You have engaged in substantial gainful  
24 activity if you render services that are significant to the  
25 operation of the business and receive a substantial income  
26 from the business.

27 (2) Test Two: You have engaged in substantial gainful  
28 activity if your activity, in terms of factors such as hours,  
skills, energy output, efficiency, duties, and  
responsibilities, is comparable to that of unimpaired  
individuals in your community who are in the same or similar  
businesses as their means of livelihood.

1 (3) Test Three: You have engaged in substantial gainful  
2 activity if your work activity, although not comparable to  
3 that of unimpaired individuals, is clearly worth the amount  
4 shown in 20 C.F.R. § 404.1574(b)(2) when considered in terms  
of its value to the business, or when compared to the salary  
that an owner would pay to an employee to do the work you are  
doing.

5 20 C.F.R. § 404.1575(a)(1-3).

6 Under the first prong of Test One, if the business involves  
7 the services of more than one person, he is considered to be  
8 rendering significant services if he contributes more than half  
9 the total time required for the management of the business or he  
10 renders management services for more than 45 hours a month  
11 regardless of the total management time required by the business.

12 20 C.F.R. § 404.1575(b)(1). Under the second prong of test one,  
13 self-employed income is evaluated by deducting normal business  
14 expenses from the claimant's gross income in order to determine  
15 the claimant's net income. This figure is then averaged and  
16 compared to the regulatory earnings threshold set forth in 20  
17 C.F.R. § 404.1574(b)(2). If the claimant's income averages more  
18 than the regulatory threshold, the claimant will be deemed to have  
19 earned substantial income. If, on the other hand, the claimant's  
20 income is less than the amounts described in 20 C.F.R. §

21 404.1574(b)(2), the claimant's income will still be deemed  
22 substantial if it is comparable to what it was before the claimant  
23 became impaired. 20 C.F.R. § 404.1575(c)(2). Under 20 C.F.R. §  
24 404.1574(b)(2), the regulatory threshold for establishing  
25 substantial gainful activity is over \$500 a month from January  
26 1990 to June 1999, over \$700 a month from July 1999 to December  
27 2000, and slightly higher for the years 2001 through 2004. 20  
28 C.F.R. § 404.1574(b)(2).

1 After reviewing the record and the contentions of the parties  
2 in this case, the undersigned finds that substantial evidence  
3 supports the ALJ's determination that Plaintiff was engaged in  
4 substantial gainful activity in the fishing industry during the  
5 relevant period (AR 20) and is therefore not disabled.

6 First, Plaintiff rendered services that are significant to  
7 the operation of his business by providing significant time to the  
8 business. 20 C.F.R. § 404.1575(b)(1). Plaintiff has worked as a  
9 self-employed commercial fisherman since 1972. (AR 342). His  
10 duties as the captain of his boat included securing the vessel,  
11 utilizing his valuable fishing license, piloting the boat,  
12 overseeing his crew, delivering his catch, and generally managing  
13 the business. He operated the business on his own with the  
14 assistance of a two or three person crew. Although he testified  
15 that he had not gone out and actually fished on the boat since  
16 approximately 2001, his duties since 2001 still entailed securing  
17 and insuring the vessel, flying up to Alaska once a year to  
18 utilize his fishing license, being present at the dock when his  
19 crew returns to deliver the catch, and, inferentially, managing  
20 the crew and the business in general in order to obtain a profit.  
21 (AR 348-349, 409-410, 420-423). Plaintiff testified that the  
22 actual fishing portion of the business takes place within 24 hours  
23 after opening day. (AR 364). He stated that all the Halibut  
24 fishing for the year would take only one day to complete. (AR  
25 364-365). It is logical to infer that Plaintiff's duties after  
26 2001, as listed above, would clearly exceed more than half the  
27 total time of this business.

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1       Moreover, with reference to his fishing employment, Plaintiff  
2 testified how he makes an income by using his fishing license, and  
3 stated "its going to happen every year like that." (AR 349).  
4 Plaintiff then pointed out that if he were to sell his fishing  
5 license, he would have no means to support himself. (AR 349).

6       Second, substantial evidence supports the ALJ's  
7 determination, pursuant to 20 C.F.R. § 404.1575(a)(1), that  
8 Plaintiff received a substantial income from his work. According  
9 to Plaintiff's income tax returns, Plaintiff's gross revenues from  
10 fishing in 1997 was \$77,179, in 1998 was \$43,237, in 1999 was  
11 \$67,628, in 2000 was \$52,700, in 2001 was \$60,896, in 2002 was  
12 \$15,904, and in 2003 was \$34,257. (AR 20-21). Plaintiff indicated  
13 at the administrative hearing that his 2004 catch was worth  
14 \$21,000 before expenses. (AR 413).

15       After deducting expenses to calculate Plaintiff's net income  
16 during these time periods (AR 20-21), it appears that Plaintiff's  
17 average monthly income exceeds the regulatory earning threshold  
18 for most of the years Plaintiff claims he was disabled. 20 C.F.R.  
19 § 404.1574(b)(2). Furthermore, Plaintiff's income tax returns and  
20 stated earnings show that his net income has remained relatively  
21 stable. Although his net income from fishing has fluctuated over  
22 time there may be other reasons for the income decreases such as  
23 market changes in the price of Halibut. More importantly,  
24 Plaintiff's post-2001 income is comparable to his pre-2001 income,  
25 20 C.F.R. § 404.1575(c)(2), and his work as a self-employed  
26 commercial fisherman during those years generally produced  
27 substantial income. Accordingly, substantial evidence supports  
28 the ALJ's determination that Plaintiff was engaged in substantial



1 gainful activity from September 15, 2001 (Plaintiff's amended  
2 onset date) to at least November 1, 2004 (the date of the ALJ's  
3 decision in this case). The ALJ correctly found that Plaintiff is  
4 not disabled at step one of the sequential evaluation process.

5 **B. Plaintiff's Credibility**

6 Plaintiff also provides a cursory argument that the ALJ erred  
7 by concluding that he was not entirely credible as a witness.  
8 (Ct. Rec. 10, p. 10). Plaintiff asserts that there exists some  
9 confusing questions and answers, given Plaintiff's language  
10 barriers, but that nothing suggests his testimony is not credible.  
11 The undersigned does not agree.

12 It is the province of the ALJ to make credibility  
13 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
14 1995). However, the ALJ's findings must be supported by specific  
15 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
16 1990). Once the claimant produces medical evidence of an  
17 underlying impairment, the ALJ may not discredit his testimony as  
18 to the severity of an impairment because it is unsupported by  
19 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
20 1998) (citation omitted). Absent affirmative evidence of  
21 malingering, the ALJ's reasons for rejecting the claimant's  
22 testimony must be "clear and convincing." *Lester v. Chater*, 81  
23 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are  
24 insufficient: rather the ALJ must identify what testimony is not  
25 credible and what evidence undermines the claimant's complaints."  
26 *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup>  
27 Cir. 1993).

28 ///

1 The ALJ determined that Plaintiff's testimony was not fully  
2 credible regarding his work activity. (AR 20). In support of  
3 this finding, the ALJ indicated that (1) Plaintiff's testimony  
4 regarding his work was sometimes contradictory (his testimony was  
5 inconsistent regarding the nature and extent of his fishing  
6 operations, and a review of his tax returns, including a review of  
7 his expenses, reveals that his fishing business is more extensive  
8 than flying up to Alaska to be present when the boat returns to  
9 the dock); (2) Plaintiff testified that he provided information to  
10 a tax return preparer regarding his income and expenses, yet he  
11 was unable to provide clarification regarding various items on his  
12 tax returns; and (3) he was inconsistent on whether he fished for  
13 salmon and halibut in recent years, although tax returns and his  
14 hand written notes indicated that he had. (AR 20, 22-23).

15 As noted above, the ALJ is responsible for reviewing the  
16 evidence and resolving conflicts or ambiguities in testimony.  
17 *Magallanes*, 881 F.2d at 751. If evidence supports more than one  
18 rational interpretation, the Court must uphold the decision of the  
19 ALJ. *Allen*, 749 F.2d at 579. It is the role of the trier of  
20 fact, not this Court, to resolve conflicts in evidence.  
21 *Richardson*, 402 U.S. at 400.

22 After reviewing the record, the undersigned judicial officer  
23 finds that the ALJ's rationale for discounting Plaintiff's  
24 testimony pertaining to his work activity is supported by the  
25 record evidence. It is significant to note that, although  
26 Plaintiff argues that a language barrier was the reason for  
27 confusion as to Plaintiff's testimony, a Russian language  
28 interpreter was present and assisted Plaintiff at both hearings.

(AR 334-458). Moreover, it appears that Plaintiff concedes that his testimony regarding his work activity was contradictory as Plaintiff originally maintained his onset date of disability was October 1998 then, upon filing his March 27, 2006 reply brief, amended the onset date to September 15, 2001. Accordingly, the undersigned finds that the ALJ did not err by concluding that Plaintiff's testimony regarding his work activity was not fully credible in this case. (AR 20, 22-23).

**CONCLUSION**

Having reviewed the record and the ALJ's conclusions, this Court finds that the ALJ's decision that Plaintiff did not meet his burden of demonstrating that he has been unable to engage in substantial gainful activity during the relevant time period is supported by substantial evidence and free of legal error. Plaintiff is thus not disabled within the meaning of the Social Security Act. Accordingly,

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is **DENIED**.

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 13**) is **GRANTED**.

3. The District Court Executive is directed to enter judgment in favor of Defendant, file this Order, provide a copy to counsel for Plaintiff and Defendant, and **CLOSE** this file.

**DATED** this 22<sup>nd</sup> day of May, 2006.

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s/Michael W. Leavitt  
MICHAEL W. LEAVITT  
UNITED STATES MAGISTRATE JUDGE